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No. 00-696

In The

Supreme Court of the United States

KURT F. FROEBEL,

Petitioner,

v.

GEORGE E. MEYER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

JOANNE F. KLOPPENBURG
Assistant Attorney General
Counsel of Record

PHILIP PETERSON
Assistant Attorney General

JAMES E. DOYLE
Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2061
Attorneys for Respondents

31pp

QUESTION PRESENTED

The question presented by the seventh circuit's decision below is whether an earlier state administrative agency proceeding and its judicial review in state court preclude Petitioner from pursuing his CWA claims in federal court.

Under the Full Faith and Credit Act, 28 U.S.C. § 1738, and the well-established line of Supreme Court cases interpreting that Act, a federal court must give a state court judgment the same claim preclusion effect that the judgment would have in the courts of the state that rendered it. Claim preclusion may apply even if the state court judgment bars claims within the exclusive jurisdiction of the federal courts.

The seventh circuit below concluded that Petitioner's Clean Water Act ("CWA") claims under 33 U.S.C. § 1365 could have been raised in a prior state administrative agency proceeding or in state court on judicial review of that prior state agency proceeding. Applying the Wisconsin law on claim preclusion, the seventh circuit held that Petitioner's failure to raise those claims in the state proceedings bars his CWA claims brought later in federal court.

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BRIEF IN OPPOSITION

Respondents George E. Meyer, Secretary of the Wisconsin Department of Natural Resources ("WDNR"), and William Sturtevant, a dam safety engineer employed by WDNR, respectfully submit this brief in opposition to the Petition for Writ of Certiorari filed by Petitioner Kurt F. Froebel.

STATUTES INVOLVED

This case, as decided by the seventh circuit below, is governed by the Full Faith and Credit Act, 28 U.S.C. § 1738, and by decisions of this Court that interpret the Act. Petitioner, nonetheless, has failed to include the Act in his petition as one of the statutes involved. Indeed, he fails to mention it anywhere in his petition. Despite its controlling authority, Petitioner simply ignores the Act.

The Full Faith and Credit Act, 28 U.S.C. § 1738, reads as follows:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto. The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form. Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

For purposes of responding to the Petition for Writ of Certiorari, Respondents Meyer and Sturtevant incorporate by reference the facts as stated in the seventh circuit opinion below. *Froebel v. Meyer*, 217 F.3d 928, 931-32 (7th Cir. 2000); Pet.-App. at 2a-5a.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF THE ARGUMENT

The real question presented by the seventh circuit's decision below is whether an earlier state administrative agency proceeding and its judicial review in state court preclude Petitioner from pursuing his Clean Water Act ("CWA") claims in federal court. Applying the established law of state/federal claim preclusion, as already interpreted by this Court, the seventh circuit held that Petitioner's federal CWA claims are barred by claim preclusion.

In his Petition for Writ of Certiorari, Petitioner contends throughout, beginning with his questions presented, that this case presents the issue of whether jurisdiction over CWA citizen suits is exclusively federal or whether, alternatively, it is concurrent with the states. On this question, he seeks the "immediate attention of the Court" arguing that this is an "extremely important" issue, on which, he says, there is a split of authority among the circuit courts of appeals. Pet. at 9-10.

But the seventh circuit's claim preclusion holding does not turn on that exclusive/concurrent jurisdiction issue. The seventh circuit fully considered and properly decided the claim preclusion issue before it by applying the law on state/federal claim preclusion found in the Full Faith and Credit Act, 28 U.S.C. § 1738, as that Act has already been

interpreted by this Court in its case law. Regardless whether jurisdiction is exclusive or concurrent, Petitioner's CWA claims are barred by claim exclusion under the Full Faith and Credit Act, and the consistent cases interpreting that Act. Neither the seventh circuit's opinion nor the law that it applied depends on answering the exclusive/concurrent jurisdiction question posed by Petitioner as the reason for this Court to grant certiorari. Consequently, that issue, which Petitioner mistakenly argues needs this Court's immediate attention, is not presented by this case. Beyond that, Petitioner has not shown that there is a significant split among the circuits on that issue.

Certiorari is unwarranted. Accordingly, Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

II. THE RELEVANT LAW ON CLAIM PRECLUSION IS WELL ESTABLISHED BY STATUTE AND EARLIER SUPREME COURT DECISIONS.

The Petition for Writ of Certiorari has a deficiency that is fatal to its argument. It ignores the Full Faith and Credit Act. The Act is never cited. Instead, Petitioner refers to claim preclusion as a "judicial doctrine." Pet. at 8. Although there are related common law principles of res judicata and preclusion, the Full Faith and Credit Act is the controlling statute. It is not a "judicial doctrine." In his petition to this Court, Petitioner has ignored the principal controlling authority at the very heart of the lower court's decision.

A. Under the Full Faith and Credit Act, federal courts must give claim preclusion effect to a state court judgment if the courts of the rendering state would do so.

The Full Faith and Credit Act, 28 U.S.C. § 1738, in part reads: "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." Case law of this Court interprets the Act. *See, e.g., Matsushita Elec. Indust. Co., Ltd. v. Epstein,* 516 U.S. 367, 373 (1996) (federal courts treat state court judgments as do courts of the rendering state); *Allen v. McCurry,* 449 U.S. 90, 96 (1980) (federal courts give preclusive effect to state court judgments if courts of rendering state would do so).

If a state court has reviewed a state administrative agency's decision, the reviewing state court's judicial review decision is also entitled to full faith and credit in federal court. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 479-485 (1982). *Kremer* concerned Title VII of the Civil Rights Act of 1964, but a number of circuit courts of appeals have concluded that its holding is not limited to Title VII cases. *See, e.g., Edmundson v. Borough of Kennet Square*, 4 F.3d 186, 189 (3rd Cir. 1993); *Rogers v. Desiderio*, 58 F.3d 299, 301 (7th Cir. 1995); *Unger v. Consolidated Foods Corp.*, 693 F.2d 703, 704-05 (7th Cir. 1982), *cert. denied,* 460 U.S. 1102 (1983); *Burney v. Polk Community College*, 728 F.2d 1374, 1381 (11th Cir. 1984).

Claim preclusion applies not only to the issues that were raised in the state proceedings, but also to issues that could have been raised there. *See Migra v. Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 84 (1984).

B. Although Congress may create exceptions to the claim preclusion effect given to state court judgments under the Full Faith and Credit Act, Congress must do so in clear language.

Only Congress, in plainly stated language, may create an exception to the Full Faith and Credit Act. *See Kremer*, 456 U.S. at 485. It has done that in the federal habeas corpus statute, 28 U.S.C. § 2254(d), but it appears it has not done that elsewhere in the statutes. This Court has noted that implied repeal of the Full Faith and Credit Act is strongly disfavored. "[W]e have seldom, if ever, held that a federal statute impliedly repealed § 1738." *Matsushita Elec.*, 516 U.S. at 380.

To find the Full Faith and Credit Act partially repealed, there must be an "irreconcilable conflict" between it and another federal statute. *Kremer*, 456 U.S. at 468 (exception to § 1738 only if repealed by another statute that by clear and manifest language irreconcilably conflicts or replaces § 1738). *See also Matsushita Elec*, 516 U.S. at 381 (*quoting Kremer*, 456 U.S. at 468).

A question as to whether Congress has created an exception can arise when Congress has given the federal courts exclusive jurisdiction to hear particular cases, such as it has for certain antitrust, patent, or bankruptcy matters. But even there, the fact that Congress has created an exclusive federal jurisdiction does not, without more, override the Full Faith and Credit Act. To override the Act, there must still be other clear statutory evidence of a congressional intent partially to repeal the Act. Without that, there is no partial repeal, and the Act applies even where there is exclusive federal jurisdiction. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380-81 (1985).

For example, the Securities and Exchange Act gives exclusive jurisdiction to the federal courts for suits under that Act. But this Court has concluded that this exclusive federal jurisdiction does not partially repeal the Full Faith and Credit Act, 28 U.S.C. § 1738. The Court has concluded that the principles of comity and repose underlying the Full Faith and Credit Act are not overridden by the exclusive federal jurisdiction provision in the Securities and Exchange Act. *See Matsushita Elec.*, 516 U.S. at 381.

Similarly, the Court has considered whether the objectives of the federal civil rights statutes outweigh the Full Faith and Credit Act. There too, the Court has held that federal civil rights statutes do not create an exception to the Full Faith and Credit Act. The Court has found no express intent to override the Act. *See Migra*, 465 U.S. at 85 (§ 1983 not override state preclusion); *Kremer*, 456 U.S. at 475 (Title VII nor repeal Full Faith and Credit Act); *Allen v. McCurry*, 449 U.S. at 96 (res judicata applies to civil rights suits).

C. Applying well-established claim preclusion law, the seventh circuit correctly held that the state proceedings bar Petitioner's federal action.

To summarize, under the Full Faith and Credit Act and the existing Supreme Court case law interpreting it, federal courts give state court decisions the same claim preclusion effect that those state decisions would have in state court. Another federal statute may create an exception to that claim preclusion effect, but that must be clearly done by Congress, and it has not been done for CWA citizen suits.

The only real underlying question presented by this case, therefore, is whether Petitioner's CWA claims brought in federal court would be precluded under state law. The seventh circuit has appropriately examined the relevant

Wisconsin claim preclusion law and concluded that Petitioner's CWA claims would be precluded under Wisconsin law. The court, accordingly, properly affirmed dismissal of Petitioner's complaint on claim preclusion grounds.

III. THIS CASE PRESENTS NOTHING NOVEL FOR THIS COURT TO REVIEW BUT IS A STRAIGHTFORWARD APPLICATION OF EXISTING LAW ON STATE/FEDERAL CLAIM PRECLUSION.

Petitioner contends that this case requires the attention of this Court because of a split in authority among the circuits about whether there is exclusive or concurrent jurisdiction to hear citizen suit cases arising under various federal environmental statutes. Pet. at 9-20. But this case does not even present that issue.

The issue of whether jurisdiction in CWA citizen suits is exclusively for the federal courts is not presented here for two reasons: First, the seventh circuit's holding below does not turn on that issue. Second, under the controlling case law of this Court, as set forth above, claim preclusion does not require concurrent jurisdiction. Instead, there may be claim preclusion even when jurisdiction is exclusively federal. This legal reality conclusively defeats Petitioner's argument for certiorari.

Beyond that, even if the exclusive jurisdiction question were properly presented by this case, Petitioner has not shown that there is any significant split among the circuits on whether jurisdiction to hear citizen suits under the various federal environmental statutes is exclusively federal.

A. The seventh circuit's holding does not depend at all on whether jurisdiction is exclusively federal.

Petitioner misreads the seventh circuit's opinion. The seventh circuit did not conclude that the CWA citizen suit provision gives either a state administrative law judge or a state court concurrent jurisdiction over claims brought in a CWA citizen suit. Under the law, that was not an issue before the seventh circuit, and it neither ruled on it nor needed to rule on it to decide the *Froebel v. Meyer* case that was before it. Consequently, contrary to what Petitioner argues, the question whether CWA citizen suits are exclusively federal cases is not presented by this case for certiorari by this Court.

In its opinion, the seventh circuit simply applied already controlling claim preclusion law to this case. As the law requires, the court looked to the Wisconsin law of claim preclusion and properly determined that a Wisconsin court would find that Petitioner is precluded from asserting his CWA claims after having failed to raise them at all in the earlier state proceedings.

The seventh circuit found that Petitioner had "never even asked the Wisconsin administrative or judicial tribunals to entertain his CWA claims." *Froebel*, 217 F.3d at 935; Pet.-App. at 12a. Concerning Petitioner, the seventh circuit found that "after failing to raise any Clean Water Act issues in state proceedings, he now wishes to vindicate federal rights in a subsequent suit" in federal court. *Id.* The seventh circuit held that "[b]y not having raised his CWA claims before either the Wisconsin administrative law judge or the Wisconsin courts, Froebel may now be precluded from asserting a Clean Water Act violation in conjunction with the very same dam removal that formed the basis of his earlier Wisconsin action." *Id.* at 932; Pet.-App. at 6a.

In so affirming the district court's dismissal of Petitioner's federal CWA citizen suit on grounds of claim preclusion, the seventh circuit did not conclude that there is concurrent state jurisdiction to hear a CWA citizen suit. Regarding this point, the seventh circuit's opinion reads in part as follows:

> Even if the state court formally would not have had jurisdiction to hear the later claim, because it fell within the exclusive jurisdiction of the federal courts, § 1738 requires the federal court to analyze the case by asking what preclusive effect the state would give the first judgment in analogous circumstances.

Froebel, 217 F.3d at 933; Pet.-App. at 8a.

This Court should not, therefore, grant certiorari to decide whether there is concurrent state jurisdiction or exclusive federal jurisdiction over citizen suit claims brought under the various federal environmental statutes that Petitioner cites in his petition. It should not do so because, as shown here, the seventh circuit's decision did not turn on an analysis of whether federal courts have exclusive jurisdiction to hear CWA citizen suits.

Petitioner also cites a number of other environmental statutes. Pet. at 11 and n.8. But the case below did not turn at all on whether federal courts have exclusive jurisdiction to hear other citizen suit cases brought under these other federal environmental statutes. Review of this case would not present those other issues for this Court's review.

In sum, Petitioner misreads the holding in *Froebel,* 217 F.3d 928; Pet.-App. at 1a-21a. He asks this Court to grant certiorari on the exclusive jurisdiction issue, but this case does not present that issue.

B. Under controlling case law of this Court, claim preclusion may apply even when there is exclusive federal jurisdiction.

Petitioner argues that he reasonably believed that CWA citizen suits must be brought exclusively in federal court and that this both barred him and excused him from raising his CWA claims in the earlier state proceedings. But under the law, these arguments fail and do not show anything that merits this Court's granting certiorari.

For Petitioner's CWA claims to be barred by claim preclusion, Petitioner needed neither to litigate nor to have been able to litigate his actual CWA claims in the state proceedings. The law on claim preclusion is broader than that.

As described above, the issue for the seventh circuit was whether state law gives preclusive effect to the earlier state court decision. If under state law there would be claim preclusion, then this Court has held that an earlier state proceeding has a claim preclusion effect in federal court too. That is so even when a plaintiff could not have brought his or her federal claim in a state action. *See Matsushita Elec.*, 516 U.S. at 378 (preclusive effect notwithstanding respondents could not have pressed their Exchange Act claims in state court).

In *Matsushita Elec.*, plaintiffs had pursued an action in Delaware "purely on state-law claims," which were settled. Meanwhile, they filed in federal court alleging violation of the Securities and Exchange Act. That Act "confer[red] exclusive jurisdiction upon the federal courts for suits brought to enforce the Act." *Matsushita Elec.*, 516 U.S. at 370-71. But this Court, nonetheless, concluded that the Full

Faith and Credit Act applies even when it might "bar the litigation of exclusively federal claims." *Id.* at 374. The Court concluded that there was preclusion "notwithstanding the fact that respondents could not have pressed their Exchange Act claims in [state court.]." *Id.* at 378. "[E]ven when exclusively federal claims are at stake, there is no 'universal right to litigate a federal claim in a federal district court.'" *Id.* at 385 (*quoting Allen v. McCurry*, 449 U.S. at 105).

Notably the Securities and Exchange Act provision in question in *Matsushita Elec.* provided even more explicitly for exclusive federal jurisdiction than does the CWA citizen suit statute involved here. *See Matsushita Elec.*, 516 U.S. at 381 ("district courts of the United States . . . shall have exclusive jurisdiction"). Compare this with 33 U.S.C. § 1365(a), which is the CWA citizens suit statute in question here. It reads in part "district courts shall have jurisdiction." Pet.-App. at 3. Contrary to what Petitioner argues here in his petition, even the stronger language in *Matsushita Elec.* still did not mean that claim preclusion under the Full Faith and Credit Act did not apply.

Similarly, *Marrese* "concerned the preclusive effect of a state court judgment in a subsequent lawsuit involving federal antitrust claims within the exclusive jurisdiction of the federal courts." *Id.* at 375. This Court stated the issue before it in *Marrese* as follows: "[W]hether a state court judgment may have preclusive effect on a federal antitrust claim that could not have been raised in the state proceeding"? *Id.* at 379. The Court concluded that its earlier decisions show that a state court judgment may have preclusive effect in later actions within the exclusive jurisdiction of the federal courts. A claim within the exclusive jurisdiction of the federal courts does not make § 1738 inapplicable. *Id.* at 380-81.

Even where there may be some compelling reason for federal courts, rather than state courts, to hear some matters, this Court has still applied the Full Faith and Credit Act. In *Migra*, 465 U.S. 75, plaintiff had prevailed in state court on state claims of breach of contract and wrongful interference with an employment contract. She then filed a federal 42 U.S.C. § 1983 action. The Supreme Court held that since her federal claim arose from the same facts as had her state suit and that it too could have been raised in state court, it was barred by res judicata. The Court so held even though it noted that § 1983 was passed in part out of a mistrust of state courts. But it concluded that even that does not override the importance of honoring the Full Faith and Credit Act. *Migra*, 465 U.S. at 84-85.

Likewise, in *Kremer*, 456 U.S. 461, this Court noted that in passing 42 U.S.C. § 1983 Congress was motivated by a "grave congressional concern that the state courts had been deficient in protecting federal rights." Still the Court concluded that even that was insufficient support for any "hold[ing] that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits." *Id.* at 476 (*quoting Allen v. McCurry*, 449 U.S. at 98-99).

In summary, therefore, as these cases show, Petitioner's principal argument that the federal courts have exclusive jurisdiction over CWA citizen suits and that because of that exclusive jurisdiction, the law on claim preclusion (set forth in the Full Faith and Credit Act) does not apply here lacks any supporting authority. The controlling Supreme Court case law is all to the contrary. Petitioner's argument, consequently, entirely fails.

C. Even if it were relevant, Petitioner has not shown a significant split among the circuits on the issue of whether jurisdiction to hear citizen suits under the federal environmental statutes is exclusive.

As shown above, even if jurisdiction over CWA citizen suits were found to be exclusively federal, the Full Faith and Credit Act still would apply despite that exclusive federal jurisdiction. Thus, the exclusive jurisdiction question is not presented by this case. But even so, it can also be shown that there is no significant split among the circuits on that issue. Indeed, there are no circuit court decisions at all directly deciding whether CWA citizen suits are exclusively for the federal courts, so, of course, there is no split.

First, Petitioner cites *Middlesex County Bd. of Freeholders v. State of N.J. Dept. of Env. Protection*, 645 F. Supp. 715 (D. N.J. 1986). Petitioner says that *Middlesex County* holds that a suit under the comparable Resource Conservation and Recovery Act ("RCRA") provision, 42 U.S.C. § 6972, is exclusively federal. Pet. at 13. But this is a federal district court decision, not a circuit court of appeals decision, so regardless of its holding, it does not show a split in the circuits. Also it is not a CWA case.

Second, Petitioner cites *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989). Pet. at 14. Petitioner correctly says that *Blue Legs* holds that there is "exclusive jurisdiction in federal courts" for suits brought under § 6972(a)(1) of RCRA. But in citing *Blue Legs*, Petitioner entirely ignores two later, relevant Supreme Court cases: *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), and *Tafflin v. Levitt*, 493 U.S. 455 (1990). *Yellow*

Freight found the words "shall have jurisdiction" insufficient to divest states of jurisdiction over federal causes of action. *Id.* at 823. Notably the CWA citizen suit statute reads the same: "district courts shall have jurisdiction." 33 U.S.C. § 1365(a); Pet. at 3. *Tafflin* held that there is a presumption that states have concurrent jurisdiction with the federal courts "to adjudicate claims arising under the laws of the United States." *Id.* at 458. Petitioner fails to cite either of these United States Supreme Court cases, and his petition ignores their direct relevance contrary to his argument.

Third, Petitioner cites *Davis v. Sun Oil Co.*, 148 F.3d 606, 611-612 (6th Cir. 1998), *cert. denied*, 525 U.S. 1018 (1998). Pet. at 15. Unlike *Blue Legs* and *Middlesex County*, it concludes that in RCRA citizen suits state courts have concurrent jurisdiction. *Davis*, 148 F.3d at 612. Unlike *Blue Legs*, *Davis* is a claim preclusion case. Based on 28 U.S.C. § 1738 and the case law of this Court, the court in *Davis* concluded that claim preclusion barred the federal action. The seventh circuit's *Froebel* decision is in accordance with *Davis*.

In citing these three cases – *Middlesex County, Blue Legs,* and *Davis* – Petitioner has not shown a significant split in the circuits that merits the attention of this Court. *Middlesex County* is not a circuit court decision. *Blue Legs* was decided back in 1989 and appears contrary to subsequent Supreme Court case law. Meanwhile, *Davis*, a 1998 decision, follows the case law of this Court on claim preclusion. Hence, contrary to what Petitioner argues, the seventh circuit decision below simply is not a matter that "presents some extremely important issues that deserve the immediate attention of the Court." Pet. at 9. Rather this case presents no issue that deserves the attention of the Court.

Beyond that, even if there were a split in the circuits that called for resolution on the issue of exclusive/concurrent jurisdiction, this *Froebel v. Meyer* case does not present that

issue. As shown elsewhere in this brief, this Court has held that state/federal claim preclusion applies even when there is exclusive federal jurisdiction.

IV. THE COURT BELOW APPLIED THE CONTROLLING LAW AND CORRECTLY DETERMINED THAT CLAIM PRECLUSION BARRED PETITIONER'S CWA CASE IN FEDERAL COURT.

The lower court's decision follows and applies the law on claim preclusion. Petitioner never raised his CWA issues in the state proceedings. The seventh circuit's decisions on claim preclusion are consistent. Contrary to what Petitioner argues, cases cited in the petition actually support claim preclusion when, as here, federal issues are not raised in the state proceedings.

A. The seventh circuit applied the state law on claim preclusion just as the Supreme Court case law requires.

Applying the Supreme Court case law that interprets the Full Faith and Credit Act, the seventh circuit held that under the Act it must give a valid Wisconsin judgment the same preclusive effect that it would have in the Wisconsin courts. Based on its review of the facts of this case and on its analysis of Wisconsin claim preclusion law, the seventh circuit concluded that Wisconsin courts would find that Froebel's subsequent CWA action in federal court is precluded by his earlier state litigation. *Froebel*, 217 F.3d at 933; Pet.-App. at 8a.

Under controlling case law interpreting the Full Faith and Credit Act, the seventh circuit followed the proper

approach for applying claim preclusion. It "[found] that all three requirements of Wisconsin's rule for claim preclusion are satisfied, and Froebel's new suit is barred." *Froebel*, 217 F.3d at 937; Pet. App. at 16a. It found that a Wisconsin court would give an administrative agency decision, as affirmed on judicial review, claim-preclusive effect. Therefore, so must a federal court.

Since the seventh circuit has followed the approach already set forth in controlling Supreme Court case law, certiorari is unwarranted. Supreme Court review of the seventh circuit's analysis of the Wisconsin case law on claim preclusion is unnecessary.

B. Petitioner should have raised his CWA issues in the state proceedings not only for the reasons described by the seventh circuit but also because Wisconsin law requires that issues be raised before the state administrative agency, even if the agency lacks authority to grant relief.

The seventh circuit concluded that if Petitioner were right on the merits and if he had raised his CWA issues in the state proceedings, he may have gotten a more favorable result there. The seventh circuit below "presume[d] that Wisconsin officials and courts would have faithfully applied federal standards if [Petitioner] had given them the chance." *Froebel*, 217 F.3d at 936. But he did not do that in the state proceedings.

Beyond this compelling reason described by the seventh circuit for Petitioner to have raised his CWA issues in the state proceedings, there is also another reason.

Wisconsin case law required him to raise all relevant issues in the state agency proceedings.

Wisconsin case law holds that a party in an administrative proceeding must raise all known issues, even constitutional ones. A party must do that even if the administrative agency lacks power to decide them. If an issue is not raised, it may not be considered later. *See Omernick v. Department of Natural Resources*, 100 Wis. 2d 234, 248, 249-50, 301 N.W.2d 437 (1981), *cert. denied*, 454 U.S. 883 (1981).

In *Omernick*, the Wisconsin Supreme Court emphasized the

> fundamental policy that parties to an administrative proceeding must raise known issues and objections and that all efforts should be directed toward developing a record that is as complete as possible in order to facilitate subsequent judicial review of the record under [the Wisconsin Administrative Procedure Act]. That policy, applicable in this case as it was in [an earlier Wisconsin Supreme Court case], requires that those constitutional issues be raised even though the administrative agency is without power to decide them.

Omernick, 100 Wis. 2d at 248, N.W.2d 437 (1981). Petitioner failed to raise his CWA issues in the state proceedings as required by *Omernick* and by the Full Faith and Credit Act as interpreted by this Court.

C. The seventh circuit's decision below is not contrary to other seventh circuit case law.

Petitioner argues that another, later seventh circuit decision conflicts with *Froebel.* Pet. at 8-9 n.4, 27-28. But contrary to what Petitioner argues, *Staats v. County of Sawyer,* 220 F.3d 511 (7th Cir. 2000), issued within a month of *Froebel*, can be distinguished from *Froebel*, and the seventh circuit has done so.

In *Staats,* the seventh circuit found that claim preclusion did not apply. In its opinion, it expressly distinguished *Froebel* from *Staats*. *Id.*, 220 F.3d at 517. *Staats* notes that, as in *Froebel*, a significant issue is whether the prior state litigation resulted in a final judgment by a court with jurisdiction. *Id.* at 515. As in *Froebel*, state jurisdiction is significant because under Wisconsin claim preclusion law the "'earlier judgment is conclusive "as to all matters which were litigated or *which might have been litigated"* in that proceeding.'" *Id.* at 515 (*quoting Jantzen v. Baker*, 131 Wis. 2d 507, 512, 388 N.W.2d 660, 662 (Ct. App. 1986), *which in turn is quoting DePratt v. West Bend Mutual Ins. Co.*, 113 Wis. 2d 306, 310, 334 N.W.2d 883, 885 (1983)) (emphasis from *Jantzen*).

The seventh circuit reconciled its decisions in *Staats* and *Froebel*. *Staats* distinguishes *Froebel* because, the court says, *Froebel* involved a state administrative agency that could consider *Froebel's* federal environmental claims while the administrative agency (the Wisconsin Equal Rights Division) hearing the Wisconsin Fair Employment Act ("WFEA") claim in *Staats* was expressly limited in its jurisdiction. The Wisconsin Equal Rights Division may not consider matters brought under federal anti-discrimination statutes. It may hear only claims brought under WFEA, and WFEA claims may only be brought there. *Staats*, 220 F.3d at 516. Because Staats' WFEA claim had to be decided in a

forum of limited jurisdiction, Staats was not precluded from bringing his federal claim later in another forum. *Id.* at 517.

Thus, these two seventh circuit decisions, *Froebel* and *Staats,* are not "impossible to reconcile" nor are they examples of "seemingly random" application of the doctrine of claim preclusion. As *Staats* states, they simply involve different administrative agencies and schemes with different jurisdictional responsibilities. Both cases apply the same law of claim preclusion but they apply it to the different facts of each case.

Petitioner advances the same argument concerning two other seventh circuit cases: *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996), and *Patzer v. Board of Regents,* 763 F.2d 851 (7th Cir. 1985). Pet. at 26-27. But both these cases can also be distinguished from *Froebel.* Again both involved the Wisconsin Equal Employment Act ("WFEA"), and both concerned earlier proceedings before a state agency "of limited jurisdiction" that "is only competent to hear claims arising under the [Wisconsin] Fair Employment Act." *Waid*, 91 F.3d at 865.

D. The petition itself shows a faulty logic in Petitioner's argument and thereby provides further support for the seventh circuit's decision.

Petitioner cites two cases apparently attempting to show that he should have been told of his claim preclusion dilemma so that he could have reserved his right to go later to federal court. He cites *England v. Louisiana State Bd. of Med. Exam'r*, 375 U.S. 411 (1964), and *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1072-73 (3rd Cir. 1990). In citing those two cases, he also includes his own parenthetical explanations for each case showing that the right to go to

federal court was dependent on reserving that right during the state proceedings. Pet. at 13 n.9.

But if reserving the right was required as a precondition for going later into federal court, then without reserving that right, the plaintiffs in those two cases would have been precluded from doing so. It follows that these two cases also defeat Petitioner's argument that, under existing law, claim preclusion should not apply because he has a right to go to federal court. He has no such right after having first litigated in state court. He never mentioned his CWA claim in the state proceedings, and the seventh circuit's claim preclusion decision is sound and needs no Supreme Court review on certiorari.

V. THE SEVENTH CIRCUIT'S FULLY CONSIDERED AND CORRECTLY DECIDED DECISION SERVES A NUMBER OF WORTHY POLICY OBJECTIVES.

Regarding claim preclusion, this Court has spoken of the trust it has in state courts to render correct decisions on federal issues. The Court has noted that "[s]tate authorities are charged with enforcing laws, and state courts are presumed competent to interpret those laws." The Court has noted the "constitutional obligation of the state courts to uphold federal law" and has noted its "confidence in their ability to do so." *Allen v. McCurry*, 449 U.S. at 105. The Court has concluded that "stripping state court judgments of finality" would destroy the "quality of adjudication by lessening the incentive for full participation by the parties and for searching reviews by state officials." *Kremer*, 456 U.S. at 478.

The Full Faith and Credit Act and the state/federal preclusive effect it requires advance some important judicial

objectives. Wasteful, vexatious, harassing, or repetitive litigation is reduced. Finality is encouraged.

Claim splitting between state and federal courts is minimized by requiring litigants to consolidate their claims in one proceeding whenever appropriate. This conserves scarce judicial resources and promotes fairness to opposing litigants. The Full Faith and Credit Act furthers respect for state agencies and the state courts. It strengthens federalism by promoting federal deference to state decision making.

These meritorious objectives are furthered by the seventh circuit's decision as it stands now. There is no need for granting certiorari to review it.

CONCLUSION

Petitioner offers no sound reason for granting certiorari. For the reasons argued above, Respondents George E. Meyer and William Sturtevant respectfully ask that this Honorable Court deny the Petition for Writ of Certiorari.

Dated this 4th day of December 2000.

Respectfully Submitted,

JAMES E. DOYLE
Attorney General

JOANNE F. KLOPPENBURG
Assistant Attorney General
Counsel of Record

PHILIP PETERSON
Assistant Attorney General

Attorneys for Respondents
George E. Meyer
William Sturtevant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2061